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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIO SALINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666(a)(1)(B), which prohibits the acceptance of a bribe by an official of a local government agency that receives more than $10,000 in federal assistance in a year, requires the government to prove that the bribe affected or could have affected the federal funds received by the agency.

2. Whether the RICO conspiracy statute, 18 U.S.C. 1962(d), requires proof that the defendant agreed personally to commit two predicate acts of racketeering.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 89 F.3d 1185.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1996. A petition for rehearing was denied on August 15, 1996. Pet. App. 48. The petition for a writ of certiorari was filed on November 12, 1996, and was granted on February 24, 1997, limited to the second and third questions presented (J.A. 167). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 18 U.S.C. 666, 1961, 1962, and 4002 are reproduced *infra*, at App. 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity (RICO conspiracy), in violation of 18 U.S.C. 1962(d), and two counts bribery by an agent of an entity receiving more than $10,000 in federal funds, in violation of 18 U.S.C. 666(a)(1)(B) and 18 U.S.C. 2 (aiding and abetting); he was acquitted on one count of racketeering, in violation of 18 U.S.C. 1962(c). Petitioner was sentenced to 36 months' imprisonment, to be followed by three years' supervised release; he also was fined $5,000. The court of appeals affirmed.

1. At the relevant times, petitioner was the Divisional Chief for Detention of the Hidalgo County Sheriff's Office. His co-defendant, Brigido Marmolejo, Jr., was the Sheriff of Hidalgo County.[1] Marmolejo was responsible for the operation of the Hidalgo County Jail, and petitioner was his second in command at the Jail. Pet. App. 1-2; Tr. 48-52.

The Hidalgo County Jail was built and improved with an $850,000 federal grant issued pursuant to a grant contract executed between the United States Marshals Service and Hidalgo County in May 1984. J.A. 31-40. Under that grant agreement, the County agreed to house federal prisoners in the completed facility. J.A. 35. The agreement between the federal government and the County was authorized by 18 U.S.C. 4002, which establishes a federal program for providing "suitable quarters for the safekeeping,

[1] Marmolejo is a respondent in this Court under this Court's Rule 12.6 and has filed a brief supporting petitioner.

care, and subsistence" of persons held in custody under federal law.

A secondary agreement between the Marshals Service and the County, executed by Sheriff Marmolejo on behalf of the County, established specific provisions for the County's housing of federal prisoners, including the compensation to be paid to the County. See J.A. 41-52. Under that agreement, it was estimated that the federal government would pay the County approximately $915,000 annually for housing federal prisoners. J.A. 43.

The Hidalgo County Jail did not permit conjugal visits. During most visits, the inmate was separated from his visitors by a glass partition. The Jail also allowed one 30-minute family contact visit during a prisoner's incarceration (additional contact visits might be permitted at the discretion of Jail officials in special cases, such as a death in the family). Contact visits took place in the attorney visiting room, the booking area, or the detention squad room, and were subject to observation by guards. Under the Jail's policy, if an ordinary contact visit became too physically intimate, the guards, after a warning, would terminate the visit. See Tr. 61-62, 76-78, 119-121, 767-769, 797.

2. Homero Beltran-Aguirre (Beltran) was a federal prisoner housed in the Hidalgo County Jail pursuant to the County's agreement with the federal government. Beltran was transferred to the Jail on June 7, 1991, and remained there until April 14, 1992, when he was transferred to another facility. Beltran returned to the Jail on November 6, 1992, and remained there until April 26, 1993. Pet. App. 2.

In August or September 1991, Beltran agreed to pay Marmolejo a series of bribes in exchange for conjugal

visits at the Hidalgo County Jail. Beltran agreed to pay Marmolejo a fixed rate of $6,000 per month for weekly visits with his wife, and also to pay $1,000 for each such visit. Beltran also paid for intimate contact visits with his girlfriend on at least five occasions. The visits occurred two days a week during the period in which Beltran was incarcerated at the Jail. See Tr. 140-141, 143-148, 218-219, 233, 253, 273-274, 476, 502-503, 547, 910-914.

Several of the visits occurred in Sheriff Marmolejo's office. On a few occasions, petitioner stood outside the office supervising the visits. Tr. 231, 253, 502-503, 544. Marmolejo also told Beltran's brother-in-law, Juan Antonio Guardado, who arranged for some of the payments, that whenever the Sheriff was unavailable, petitioner should be contacted about the conjugal visits. Tr. 253, 502-503, 547.

In January 1992, Beltran instructed Guardado to purchase four pairs of Rado watches. The watches cost Beltran approximately $8,500. Beltran and Guardado gave petitioner and Marmolejo each a pair of watches, and told petitioner to give another pair to Captain Andres Alaniz, which he did. On another occasion, Guardado gave petitioner a 1984 Chevrolet Silverado pickup, valued at $3,000-$4,000. See Tr. 235-237, 497-501, 561, 756.

3. The RICO conspiracy count of the indictment, Count 2, alleged that "each defendant agreed that two or more of the acts of racketeering activity, as specified in paragraph 7 of Count One, * * * would be committed in the conduct of the affairs of the enterprise." J.A. 89. The alleged pattern of racketeering activity consisted of 14 state felony bribery offenses, in violation of Texas Penal Code, Section

36.02(a).[2] There was no allegation that each defendant agreed personally to commit two racketeering acts.

At trial, petitioner requested an instruction that, in order to find him guilty of RICO conspiracy, the jury was required to find that he agreed personally to commit two racketeering acts. Although the government did not object to that proposed charge, the district court rejected it. The court stated that the case should be submitted to the jury under "classic conspiracy law" (J.A. 116): "As long as I tell them that he has to know that the object of the conspiracy is running the enterprise with a pattern of racketeering, involving more than two acts, knowing that, did he then, at some point, join in to participate in assisting that conspiracy to be run. It seems to me that's classic conspiracy law with RICO." *Ibid.*; see also J.A. 109-111. Accordingly, the court instructed the jury as follows:

> So what the government has to prove is that the two of these gentlemen reached an agreement with each other that they were going to run the Sheriff's Office through a pattern of racketeering acts, that they were going to run the Sheriff's Office through a system of collecting bribes from one of these prisoners in return for doing favors for him, and that each of the defendants knew that

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[2] That Texas offense provides that a person commits a second-degree felony punishable by up to 20 years' imprisonment if "he intentionally or knowingly * * * accepts * * * from another: (1) any benefit as consideration for the recipient's * * * exercise of discretion as a public servant." Tex. Penal Code Ann. § 36.02(a) (West 1994); see *id.* § 36.02(e) (designating the offense as second-degree felony); *id.* § 12.33(a) (defining punishment for second-degree felony).

that was the idea and that each of them willfully joined in.

J.A. 137-138.

4. A divided panel of the court of appeals affirmed petitioner's convictions. Pet. App. 1-47. Judge Jolly dissented with respect to the bribery convictions. *Id.* at 37-47.

a. The court first rejected petitioner's contention that his acceptance of bribes did not fall within the reach of 18 U.S.C. 666 because the County Jail had not received "[f]ederal assistance" exceeding $10,000 in a year. Petitioner contended that the federal funds received by the County pursuant to its contract with the Marshals Service to house prisoners were simply payments for services rendered, and therefore were not "[f]ederal assistance" within the meaning of the statute. The court noted, however, that the contract to house prisoners was "interrelated" with the federal government's grant of funds to the County for jail construction, since, "[a]s a condition to the receipt of this grant, Hidalgo County Jail had to guarantee that it would provide detention space for federal prisoners." Pet. App. 6-7. Accordingly, the court concluded that the grant agreement and the contract, together, constituted "[f]ederal assistance" or a "[f]ederal program" within the meaning of Section 666(b). Pet. App. 7.

The court also concluded that, even with respect to the contract payments alone, petitioner's argument that the funds for housing prisoners were not "[f]ederal assistance" must fail. The court noted that the purpose of Section 666 is to protect the integrity of federal programs for which there is a "specific statutory scheme authorizing the Federal assistance

in order to promote or achieve certain policy objectives." Pet. App. 8 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 371 (1983)). To determine whether federal funds were "[f]ederal assistance," the court therefore asked "whether the funds disbursed [could] be considered Federal assistance within a specific scheme intended to promote public policy objectives and not payments by the government as a commercial entity." *Ibid.* Because the funds provided by the federal government in this case were intended to fulfill the government's policy of providing for the safekeeping and care of prisoners in federal custody, it was irrelevant, the court concluded, that the government received something in return for the assistance it provided to the County. *Ibid.*

b. The court also rejected petitioner's argument that permitting Beltran to have conjugal visits in the County Jail was not a transaction involving "anything of value of $5,000 or more," as required by Section 666(a)(1)(B). The court noted, first, that under circuit precedent, Section 666(a)(1)(B) "does not require the government to prove that federal funds were directly involved in a bribery transaction, or that the federal monies funded the corrupt transaction." Pet. App. 10-11. It also noted that the phrase "*anything* of value" is "broad in scope and contains no language restricting its application to transactions involving money, goods, or services." *Id.* at 11 (emphasis added). The court therefore concluded that the phrase includes "transactions involving intangible items, such as the conjugal visits at issue in this case." *Ibid.* "Because the conduct in this case involves serious acts of bribery by agents of a local government who were carrying out their duties under a Federal program," the court stated, "this case is

within the scope of conduct Congress intended to encompass within 18 U.S.C. § 666." *Id.* at 14.

The court observed further that "[t]he transactions involved something of value—conjugal visits that Beltran was willing to pay for." Pet. App. 16. Because Beltran was willing to pay more than $5,000 to obtain conjugal visits, the court held that the visits had a value of more than $5,000. The court reached that conclusion "in the same way an appraiser would value an asset—by looking at how much a person in the market would be willing to pay for [the visits]." *Id.* at 17-18.

c. The court further rejected petitioner's contention that the trial judge erred in refusing to instruct the jury that, to find petitioner guilty of RICO conspiracy, it was required to find that he agreed personally to commit two predicate acts of racketeering. Pet. App. 21-26. The court reasoned that nothing in the language of the RICO conspiracy provision, 18 U.S.C. 1962(d), "indicates that Congress intended to do anything more than to criminalize a conspiratorial objective—the violation of a substantive RICO provision." Pet. App. 24. To accept petitioner's argument that RICO conspiracy contains a special element of agreement personally to commit an offense "would be a marked departure from traditional conspiracy law for which there is no support in the language of the statute or the legislative history." *Id.* at 25.

SUMMARY OF ARGUMENT

I. Petitioner's conviction satisfied all the elements of the offense of bribery under 18 U.S.C. 666(a)(1)(B). The evidence established, beyond a reasonable doubt, that petitioner was an agent of an

agency of local government, the Hidalgo County Sheriff's Office; that the Sheriff's Office received more than $10,000 in a year in federal assistance; that petitioner corruptly accepted, or aided and abetted the acceptance of, bribes from Beltran in return for a transaction of the Sheriff's Office (allowing Beltran to have conjugal visits at the Jail); and that those conjugal visits were something of value worth at least $5,000. The government was not required to show, in addition, that the transactions (the conjugal visits) involved the disbursement or affected the integrity of federal funds.

The text of the statute does not require the government to prove that a bribe made unlawful under Section 666(a)(1)(B) affected or could have affected federal funds. The statute expressly prohibits bribe-taking in connection with "any * * * transaction" of the agency, reaching broadly to cover any transaction of any kind whatsoever, as long as the transaction involves a matter worth at least $5,000. Congress did not limit the statute to transactions shown in a particular case to involve or affect federal funds.

The legislative history of Section 666 also provides no basis for the limited construction suggested by petitioner. That history suggests, at most, that Congress was particularly concerned about bribery that would affect the integrity of federal funds. It does not indicate, however, that Congress intended to limit the offense to cases where a threat to federal funds was established at trial as an element of the offense. Certainly the legislative history does not compel that conclusion to the extraordinary degree that would be necessary to disregard the plain language of the statute.

Section 666(a)(1)(B) is a valid exercise of Congress's spending power. Under the spending power, Congress may attach reasonable conditions to the receipt of federal funds by local governmental entities. In Section 666, Congress has required that officials of local governments receiving federal funds adhere to high standards of integrity, even if those officials do not themselves disburse federal funds. Those officials may, as in this case, be responsible for administering a federal program, and their corrupt activities may jeopardize the attainment of the federal program's ends. More generally, Congress was entitled to conclude that agencies receiving federal money must be free of significant corruption, since an agency with problems of corruption in the implementation of state and local affairs might also be untrustworthy in handling federal monies or implementing a federal program.

II. Petitioner's conviction under 18 U.S.C. 1962(d) for conspiracy to violate the RICO statute also is valid. The district court properly instructed the jury that it could find petitioner guilty if it found that he had agreed with his co-conspirators that they would operate an enterprise (the Sheriff's Office) through a pattern of racketeering acts (the collection of bribes from a prisoner), including at least two acts of racketeering. The jury was not required to find also that petitioner agreed to commit two acts of racketeering personally.

Under traditional principles of conspiracy law, a defendant may be found guilty of conspiracy upon proof that he agreed with his co-conspirators that a crime would be committed by some member of the conspiracy. There is no requirement that each conpirator agreed to commit the object crime personally.

That rule follows from the nature of a conspiracy as a partnership in crime, in which the partners act for each other in their joint effort to commit offenses.

Congress is presumed to adopt the settled meanings of common law terms that it includes in statutes, and so is presumed to have adopted settled aspects of conspiracy law when it defined the offense of conspiring to violate RICO. The RICO conspiracy statute, 18 U.S.C. 1962(d), makes it an offense to conspire to violate a substantive provision of RICO. Section 1962(d) does not alter the nature of a conspiracy by adding any new requirement that the defendant agree personally to commit the predicate acts of racketeering.

That construction of the RICO conspiracy offense serves Congress's overarching objective in RICO of combatting organized crime. A principal practical difficulty with prosecuting leaders of organized-crime operations has always been that such leaders insulate themselves from the actual commission of offenses. A requirement that conspirators be shown to have agreed to commit two acts of racketeering personally could inhibit the government's ability to prosecute members of organized-crime operations who agree and lend assistance to the commission of crimes through an enterprise but who do not commit the crimes themselves. And requiring proof of agreement to commit the predicate crimes personally is not necessary to preserve the elements of the object RICO violation involving Section 1962(c), namely, that an enterprise exist, that the predicate crimes constitute a pattern, and that the racketeers conduct or participate in the conduct of the enterprise. To be guilty of such a conspiracy to violate RICO, one must not merely agree to the commission of two

racketeering crimes; one must agree to the conduct of the affairs of an enterprise through a pattern of racketeering crimes. Thus, the government must show that the co-conspirators anticipated the pursuit of ongoing, related criminal activity through a formal or informal arrangement with an ascertainable structure.

ARGUMENT

I. PETITIONER'S CONVICTION SATISFIED ALL THE ELEMENTS OF THE OFFENSE UNDER 18 U.S.C. 666(a)(1)(B)

Petitioner was convicted on two counts of violating 18 U.S.C. 666(a)(1)(B). Section 666(a)(1)(B) provides, in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists —
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —
>
> * * * * *
>
> (B) corruptly solicits or demands for the benefit of any person of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> * * * * *

> shall be fined under this title, imprisoned not more than 10 years, or both.

The "circumstance described in subsection (b)" referred to in the first clause of Section 666(a)(1)(B) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b).

Accordingly, to obtain a conviction under Section 666(a)(1)(B), the government must show (as relevant here) that (1) the defendant was an agent of an agency of local government; (2) the defendant's agency received more than $10,000 in a year in federal assistance; (3) the defendant corruptly accepted something of value intending to be influenced in connection with transactions of his agency; and (4) the transactions of the agency influenced by the corrupt payment involved something worth at least $5,000. All of those elements were proven beyond a reasonable doubt at petitioner's trial. The statute establishes no further elements of the offense.

Petitioner contends nonetheless (Pet. Br. 5-24) that his conduct was not encompassed by Section 666. Primarily, petitioner argues that Section 666 required the government to prove at trial that his acceptance of a bribe had, or could have had, an impact on federal funds. There is no such requirement in the statute, nor should one be implied.

Petitioner also argues (Pet. Br. 15-23) that the government did not establish either (1) that the Hidalgo County Sheriff's Office received $10,000 in annual "benefits" under a federal program or (2) that he was an agent of an agency of local government.

Neither contention is fairly included in the questions on which the Court granted review, and, in any event, both claims are incorrect.

A. Section 666 Does Not Contain An Implicit Requirement That A Bribe Must Affect Federal Funds

Petitioner does not contest that he corruptly accepted, and aided and abetted Sheriff Marmolejo's acceptance of, bribes in exchange for Beltran's conjugal visits, or that permitting those conjugal visits were transactions of the Sheriff's Office within the meaning of Section 666. He also does not contest that those conjugal visits, for which Beltran paid $6,000 per month and $1,000 per visit, constituted "anything of value of $5,000 or more." He argues, however (Pet. Br. 6), that Section 666 requires that the $5,000 transaction influenced by the bribe be shown to be a matter that affects the disbursement or integrity of the federal funds received by the local government agency. That contention is without any basis in the statute.[3]

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[3] All the courts of appeals that have addressed the precise issue presented here have rejected the contention that the bribe-taking must be shown to have an impact on federal funds. See *United States* v. *Paradies*, 98 F.3d 1266, 1288-1289 (11th Cir. 1996), petition for cert. pending, No. 96-1346; *United States* v. *Bonito*, 57 F.3d 167, 172-173 (2d Cir. 1995), cert. denied, 116 S. Ct. 713 (1996); *United States* v. *Coyne*, 4 F.3d 100, 108-109 (2d Cir. 1993), cert. denied, 510 U.S. 1095 (1994); *United States* v. *Simas*, 937 F.2d 459 (9th Cir. 1991); *United States* v. *Westmoreland*, 841 F.2d 572, 576 (5th Cir.), cert. denied, 488 U.S. 820 (1988).

In *United States* v. *Foley*, 73 F.3d 484, 492-493 (1996), the Second Circuit, relying on an "infer[ence] from the legislative history that * * * section [666] was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds," held that the corruption must involve a transaction valued at $5,000 or more from the perspective of the entity that receives the federal financial assistance. That construction also has no basis in the text of Section 666. The statute flatly prohibits corrupt acceptance of bribes by an agent of a recipient of federal funds to influence a transaction of the recipient "involving anything of value of $5,000 or more"; it does not require that the thing of value be measured by its worth to the recipient of the funds rather than the bribe giver. The $5,000 requirement represents a congressional determination that corruption in transactions of a magnitude of $5,000 or more itself poses a threat to the integrity of federal funds and programs. The *Foley* court's extra-textual limitation on the statute would effectively immunize corrupt transactions involving payments of $5,000 or more for government benefits that are difficult to value from the perspective of the government, such as licenses, exemptions, approvals, and numerous other regulatory actions. The restriction is thus unfounded.

1. Section 666 contains no language requiring a showing that a bribe directly or indirectly affect federal funds. Rather, what Section 666 requires is that the bribe be in connection with "*any* business, transaction, or series of transactions of [an] organization, government, or agency" that itself receives federal funds. 18 U.S.C. 666(a)(1)(B) (emphasis added).[4] "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 117 S.

[4] Likewise, the theft offense defined by Section 666(a)(1)(A) requires only that the property stolen have a value of $5,000 or more and be under the custody or control of the organization receiving the requisite $10,000 in federal funds. There is no requirement that the $5,000 stolen have any connection with the federal funds. All that is required is that the property have a connection with the organization receiving federal funds.

Ct. 1032, 1035 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Congress did not include a limiting phrase such as "involving federal funds" or "in connection with federal funds," although it easily might have done so if there had been an intention to so limit the statute. See *United States* v. *Westmoreland*, 841 F.2d 572, 576 (5th Cir.) (Section 666 "contains nothing to indicate that 'any transaction involving $5,000' means 'any federally funded transaction involving $5,000' or 'any transaction involving $5,000 of federal funds,' and other subsections of the statute contain no inconsistent provisions that might suggest such a qualification"), cert. denied, 488 U.S. 820 (1988). The purpose of omitting such a limitation is evident: rather than adopting a cumbersome requirement of tracing federal dollars to particular corrupt activities, Section 666, as drafted, "allow[ed] Congress to ensure the integrity of federal funds by protecting the integrity of the organizations that receive them." Pet. App. 16. Accordingly, "any transaction" must be given its plain meaning; there is no requirement that it be a transaction involving or implicating federal funds.

Petitioner contends (Pet. Br. 11-15) that Section 666 contains no "clear statement" that it is to be applied to bribery of state officials, and that such a clear statement is required by *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *McNally* v. *United States*, 483 U.S. 350 (1987). That contention is plainly incorrect. Section 666 by its express terms prohibits acceptance of bribes by anyone who is an "agent of * * * a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C. 666(a)(1). No further language is necessary to make clear that Section 666 applies to

corruption of local officials who are agents of recipients of federal funds, whether or not federal funds are involved in the corrupt transaction.

2. In contending that Congress intended to reach corrupt bribe-taking only when shown to pose a threat to the federal funds received by recipients of grant assistance, petitioner relies on the legislative history of Section 666. But there is no basis here for adding a significant limitation to the scope of a clear criminal prohibition on the theory that the limiting principle may be found in the legislative history. See *Gonzales*, 117 S. Ct. at 1035 ("Given the straightforward statutory command, there is no reason to resort to legislative history."). As we have explained, the text of Section 666 is plain and evinces no limitation of the offense to bribe-taking that is proven to endanger federal funds.

Even if a truly compelling showing based in the legislative history could justify a departure from the statutory language in this case, the legislative history of Section 666 does not yield the "extraordinary showing" that would be necessary to conclude that Congress intended to enact the restricted reading of the statute put forward by petitioner rather than the plain meaning of the text. Cf. *United States* v. *Albertini*, 472 U.S. 675, 680 (1985); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994). The Senate Judiciary Committee Report accompanying Section 666 explained that the statute was enacted in part because of uncertainty about the reach of 18 U.S.C. 201, which prohibits corrupt bribery of "any public official," including any "person acting for or on behalf of the United States," 18 U.S.C. 201(a). See S. Rep. No. 225, 98th Cong., 1st Sess. 369-370 (1983). At the time that Section 666 was

enacted, the courts of appeals were divided as to whether Section 201(a) applied to state officials and employees of private entities that had not contracted directly with the federal government. That uncertainty was eventually resolved by this Court in *Dixson* v. *United States*, 465 U.S. 482, 499 (1984), which held that a person employed by a state government or private organization may be a "public official" within the meaning of Section 201, if he or she "possess[es] some degree of official responsibility for carrying out a federal program or policy." The Senate Report indicated that Congress wanted the new Section 666 to reach at least as far as lower court decisions that, at the time, had construed Section 201 to cover persons who had not entered into a direct contractual relation with the federal government, but who had responsibility for administering federal programs. See S. Rep. No. 225, at 370 & nn.2, 3 (discussing court of appeals cases).

Rather than amend Section 201 or draw on language in an earlier proposed bill that expressly required a link between the bribe and a federal program,[5] however, Congress created an entirely "new

[5] The Committee Report indicated that Section 666 was "derived" from a bribery provision in an earlier, unenacted proposed comprehensive revision of Title 18. S. Rep. No. 225, at 369 & n.1; see S. Rep. No. 307, 97th Cong., 1st Sess. 802-804 (1981). That earlier provision would have defined a federal offense of "commercial bribery" where the defendant was an agent or fiduciary of "an organization charged by Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, and if the recipient's conduct is related to the administration of such program." *Id.* at 803; see S. 1630, 97th Cong., 1st Sess. § 1751(c)(1)(I) (1981). In Section 666, however, Congress enacted no condition that the conduct be "related

offense[]" (S. Rep. No. 225, at 369) with a different scope from that of Section 201. Whereas Section 201 reaches bribery by anyone who implements a federal program, regardless of the value of the transaction affected by the bribe or the amount of federal assistance received by the bribe-taker's organization, Section 666 reaches corrupt bribery whether or not the agent is exercising "official responsibility for carrying out a federal program or policy" (*Dixson*, 465 U.S. at 499), but only if the agent is associated with a recipient of $10,000 or more annually of federal assistance, and only if the bribe involves a transaction of the agency worth at least $5,000.

The Senate Report stated that Section 666 should be construed broadly, to achieve its purpose of protecting funds distributed through federal programs from bribery, fraud, and theft. S. Rep. No. 225, at 370. The Report did not suggest, however, that the statute should be construed to achieve only that purpose. Congress evidently believed that recipients of significant federal assistance should be held to the highest standards of integrity, and that any significant corrupt transaction by an agent of those recipients, whether or not the corruption directly endangers federal funds, triggers federal concern. That view is reasonable; a state or local official who engages in corrupt bribe-taking with respect to state monies and transactions might well do the same with respect to a transaction involving federal funds.

to the administration of" the program receiving federal assistance, even though it could have easily used language from the proposed legislation of the 97th Congress to create such a requirement.

While the Senate Report suggests that Congress's main purpose in enacting Section 666 was to protect funds distributed through federal programs, it does not support the claim that Congress intended to require prosecutors to show in each case that the corrupt transactions impaired federal funds. The unqualified language used by Congress in Section 666 leaves no room for any such argument. Evidence that some members of Congress had particular fact patterns in mind when they recommended the enactment of Section 666 provides no basis for limiting the application of the statute to those particular factual scenarios. See *Albertini*, 472 U.S. at 681-682 (noting that, although congressional debates suggested that the primary purpose of 18 U.S.C. 1382 was to punish spies and panderers for repeated entry into military installations, the text of the statute was not limited to such persons and did not preclude application to political protesters); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985) (declining to create "racketeering injury" requirement to RICO civil action when such requirement did not exist in text of statute, even while recognizing that RICO "is evolving to something quite different from the original conception of its enactors").

3. Petitioner and *amicus* NACDL suggest that, unless Section 666 is narrowly construed to reach only acts of bribery that affect federal funds, it exceeds Congress's legislative authority under the Constitution. See Pet. Br. 14-15; NACDL Br. 23-29. That argument is without merit. Section 666 is a valid exercise of Congress's spending power under Article I, Section 8, Clause 1, which authorizes Congress to "provide for the common Defence and general Welfare of the United States." Section 666 ensures

that States and local governmental units that accept federal financial assistance exceeding $10,000 in a year will adhere to high standards of integrity, and requires that they act through agents who do not abuse their positions of public trust by corruptly accepting bribes in conducting official business. The requirement that officials whose agencies administer significant federal program funds refrain from accepting bribes in any substantial transaction (whether or not it involves the federal funds) is a reasonable and appropriate method of ensuring the integrity of the administration of the federal funds.

"Incident to [its spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)). Moreover, Congress may permissibly accomplish objectives through the use of the spending power even if those objectives are "not thought to be within Article I's 'enumerated legislative fields'" such as the Commerce Clause power. *Id.* at 207 (quoting *United States* v. *Butler*, 297 U.S. 1, 65 (1936)). "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 144 (1947).

The spending power is subject to three "general" restrictions, *Dole*, 483 U.S. at 207, all of which are met here. First, the spending must be for the "general welfare," a matter to which substantial

deference is given to the judgment of Congress. See *ibid.*; *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937). This case, however, does not involve any challenge to the propriety of the *expenditures* authorized by Congress (as was true in *Helvering* v. *Davis*) but rather to the conditions placed on that spending. In any event, no deference is required to see the prudence of requiring high standards of integrity at agencies involved in administering federally funded programs.

The second limitation is that the condition on the receipt of federal funds must be clearly stated, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981)). The prohibition on bribery in Section 666 is stated expressly on the face of the statute. And the prohibition may permissibly fall on the *employee* even though it is the governmental *agency* that receives the funds. In *Oklahoma* v. *Civil Service Commission*, *supra*, the Court upheld, as a valid exercise of authority under the spending power, federal restrictions on partisan political activities by state employees whose employment was connected to any activity financed in whole or part by federal funds. 330 U.S. at 143-144.

Third, the Court has suggested that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Here, there is a reasonable relationship between the condition imposed on the federal funds—insisting that those who

work for local agencies that receive substantial federal program funds do not engage in corruption—and the purpose of the condition—protecting the integrity of the administration of those federal programs. Cf. *New York* v. *United States*, 505 U.S. 144, 172-173 (1992) (finding a "reasonable relationship" between "milestones" required to be accomplished by States in disposal of radioactive waste and payments to States from surcharges on such waste, to be made only if States achieved those milestones). It was reasonable for Congress to insist that all personnel of agencies handling federal funds adhere to high standards of integrity, whether or not they are directly involved in implementing federal programs or disbursing federal funds.

In this case, of course, the law enforcement officials who engaged in corrupt activity "were in charge of carrying out the Federal program of housing and safekeeping the federal prisoners, including [the bribe-payor] Beltran, at Hidalgo County Jail." Pet. App. 15-16. Their corrupt activities thus undermined the very federal program for which federal monies were being paid to the local agency. But Congress could reasonably conclude that an agency with a problem of corrupt employees handling state or local affairs might also fail the requisite standard of integrity when implementing federal policies. Thus, Congress could reasonably insist that a local agency that receives significant federal assistance be free of corruption entirely.

This is not a case in which the conditions imposed on receipt of federal funds in Section 666 "pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211 (internal citation omitted). In this case, Hidalgo County was free to refuse the federal

financial assistance that it received in building the County Jail. Nor was the County compelled to enter into a contract to house federal prisoners. While presumably the County agreed to do so because it obtained a benefit in obtaining the federal *per diem* reimbursements, there is no indication that those benefits were anything more than a "relatively mild encouragement," *ibid.*, to cooperate with the federal government. Moreover, the agreements with the Marshals Service did not compel the County to alter any local policy with respect to public corruption in order to conform to federal requirements; bribery is contrary to the law of Texas as well as the United States. See Tex. Penal Code Ann. § 36.02(a) (West 1994). Accordingly, Section 666(a)(1)(B) does not exceed Congress's spending power.[6]

4. Finally, petitioner (Pet. Br. 13) and *amicus* NACDL (Br. 11-12) rely on the rule of lenity. That rule applies only in a case of statutory ambiguity, where the Court "can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 117 S. Ct. 921, 931 (1997) (internal quotation marks omitted). Here, the text of the statute is unqualified, and to the extent that the legislative history may be relevant, cf. *Gonzales*, 117 S. Ct. at 1035, that history discloses no basis for engrafting on Section 666 a requirement that the bribe must be shown to affect federal funds. Accordingly, "this is not a case of

[6] The Court has also noted that an exercise of the spending power may be invalid if it contravenes some "independent constitutional bar" such as the Eighth Amendment, see *Dole*, 483 U.S. at 210-211, but that consideration has no application to this case.

guesswork reaching out for lenity." *Wells*, 117 S. Ct. at 931.

B. Petitioner Was An Agent Of A Local Government Agency That Received More Than $10,000 In A Year Of Federal Program Benefits

Petitioner contends that two explicit elements of the offense under Section 666(a)(1)(B) were not satisfied. First, he argues (Pet. Br. 15-20) that the Hidalgo County Sheriff's Office did not receive $10,000 in annual "benefits" under a "Federal program" within the meaning of the statute, because the payments made by the United States Marshals Service to Hidalgo County for the housing of federal prisoners like Beltran were merely payments for services rendered, and not programmatic assistance. Second, he argues (Pet. Br. 20-23) that he was not an agent of local government because the Sheriff's Office for which he worked was not a local government agency. Neither of those arguments is fairly included within the questions on which this Court granted review, and neither is therefore properly before the Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).[7] Both contentions are in any event without merit.

1. Petitioner was unquestionably an agent of an agency of local government, the Hidalgo County Sheriff's Office. Although petitioner argues that the Sheriff's Office is not a local governmental agency because it is independent of the County, the evidence

[7] In particular, petitioner's contention that the federal funds were merely payments for services rendered is an attempt to argue the first question presented in the petition for a writ of certiorari, which this Court excluded from its grant of review. See Pet. i; J.A. 167.

at trial showed that Sheriff Marmolejo signed the contract to house federal prisoners on behalf of Hidalgo County. See J.A. 43, 45-46. Furthermore, Section 666 reaches all local governmental agencies of any kind; Section 666(d) defines a "government agency" to include "a subdivision of the executive, legislative, judicial, *or other branch of government*, including a department, *independent establishment*, commission, administration, authority, board, and bureau." 18 U.S.C. 666(d)(2) (emphasis added).

2. The Sheriff's Office received more than $10,000 under a "Federal program involving a grant, contract, * * * or other form of Federal assistance" during the relevant periods. The Cooperative Agreement Plan (CAP) (J.A. 31-40) provided for a federal grant to the County for construction at the Jail; that grant was conditioned on the County's agreement to house federal prisoners at the Jail in exchange for their costs (J.A. 35), which agreement was later memorialized in the Intergovernmental Service Agreement (IGA) signed by Sheriff Marmolejo (J.A. 41-52). Pursuant to the CAP and IGA, the federal government paid the Sheriff's Office about $70,000 per month for prisoner housing during the relevant period, an amount far exceeding the jurisdictional prerequisite of $10,000 in federal funding per year. See Tr. 1121-1122, 1126, 1137.

Petitioner argues that the federal payments for prisoner housing were not "[f]ederal assistance" because they were merely payments for commercial services rendered by the County Jail. He relies (Pet. Br. 18-19) on a statement in the legislative history of Section 666 to the effect that "not every federal contract or disbursement of funds would be covered" by Section 666. S. Rep. No. 225, at 370. The Senate

Report indicates, however, that disbursements of funds under federal contracts are covered by Section 666 as long as they are pursuant to a "[f]ederal program," which the Report explained to mean "that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." *Ibid.* See *United States* v. *Rooney*, 986 F.2d 31, 35 (2d Cir. 1993) ("The inquiry is not whether there is a *quid pro quo*, but, rather, whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payment by the government as a commercial entity.").

In this case, there is a "specific statutory scheme" under which the CAP and IGA were entered into, and under which the Jail received the federal payments for housing federal prisoners. The CAP and IGA were executed under 18 U.S.C. 4002, which authorizes the Attorney General to enter into contracts with state and local authorities to arrange for "suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress." The CAP, which was "predicated upon the Federal government's requirement for detention space and services and the local government's provision of such services," provided for "Federal participation in the funding of local governmental jail construction, renovation or improvement programs." J.A. 32. In effect, the CAP and IGA were part of a federally funded jail construction and operation program, and although title to the County Jail remained in the hands of the local government, one of the major purposes of federal funding of the Jail was to provide space needed for the federal government's own inmates when their presence was required in the

area. Accordingly, under the terms of Section 666, the Sheriff's Office received, within the relevant periods, "benefits in excess of $10,000 under a Federal program involving a grant, contract, * * * or other form of Federal assistance."

II. THE RICO CONSPIRACY STATUTE, 18 U.S.C. 1962(d), DOES NOT REQUIRE THAT THE DEFENDANT AGREE PERSONALLY TO COMMIT ANY PREDICATE ACTS OF RACKETEERING

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a crime to conduct, or participate in the conduct of, the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. 1962(c). A "pattern of racketeering activity" requires "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. 1961(5). "[R]acketeering activity" covers various offenses, including state felony offenses involving bribery. 18 U.S.C. 1961(1). The RICO statute also punishes, as a separate crime, conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. 1962(d).

In this case, petitioner and his co-conspirators were charged with conspiring to conduct the affairs of the Hidalgo County Sheriff's Office (the enterprise) through two or more acts of bribery, constituting a pattern of racketeering activity. See J.A. 89. The conspiracy count did not charge that any of the four conspirators agreed *personally* to commit two racketeering acts; rather, it alleged (and the jury found) that petitioner agreed "that two or more acts of racketeering activity * * * would be committed in the conduct of the affairs of the enterprise." *Ibid.*

Petitioner contends that, to be guilty of RICO conspiracy, a defendant must agree to engage in the pattern of racketeering personally, and that it is not sufficient that he agree to the commission of the predicate acts by a member of the conspiracy. That proposed rule is contrary to traditional principles of conspiracy law, and there is no indication in the RICO statute that Congress intended to impose such a novel and strict requirement of proof in order to convict RICO conspirators.

1. "A conspiracy is a partnership in crime." *Pinkerton* v. *United States*, 328 U.S. 640, 644 (1946). "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) (discussing predecessor to 18 U.S.C. 371). Under traditional principles of conspiracy law, there is no requirement that any of the conspirators agree personally to commit the substantive offense that is the objective of the confederation; unless the particular conspiracy statute requires the commission of an overt act in furtherance of the conspiracy, all the government must show to prove conspiracy is that the defendant entered into an agreement with the objective of violating one or more criminal statutes. See *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994); *Braverman*, 317 U.S. at 53; *United States* v. *Holte*, 236 U.S. 140, 144 (1915).

The absence of any requirement that a conspirator agree *personally* to the commission of a substantive offense stems from the fundamental point that "a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." *United States* v. *Rabinowich*, 238 U.S. 78, 85 (1915).

Entering into a conspiracy is prohibited by law, not merely because the conspirator has a desire or intent that the law be violated, but because (among other reasons), by entering into the arrangement to commit a crime, the conspirator creates a greater danger that the crime will in fact be committed *by someone*. See *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). In a conspiracy, "so long as the partnership in crime continues, the partners act for each other in carrying it forward." *Pinkerton*, 328 U.S. at 646. Thus, one may be guilty of conspiracy to commit an offense even if he is *incapable* of committing the substantive offense. *Rabinowich*, 238 U.S. at 86; see *Holte*, 236 U.S. at 144-145.

Nor is it necessary, for a conspiracy conviction, that the conspirators have identified and come to agreement on the precise details of their criminal objectives. As Judge Learned Hand cogently explained, "a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944); see also *Johnson* v. *United States*, 62 F.2d 32, 33 (9th Cir. 1932). "The fact that the defendants may not have known all the particulars of the total scope of a conspiracy does not bar a conviction." *United States* v. *Bastone*, 526 F.2d 971, 981 (2d Cir. 1975), cert. denied, 425 U.S. 973 (1976); see also *Jones* v. *City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Posner, J.) ("It is enough if you understand the general objectives of the scheme, accept them, and agree, either

explicitly or implicitly, to do your part to further them.").

Accordingly, one who agrees to assist in accomplishing the essential objective of an illegal scheme is guilty of conspiracy, whether or not he agrees personally to commit the substantive offense that is the object. See *Pinkerton*, 328 U.S. at 645-647; *Blue* v. *United States*, 138 F.2d 351, 360 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944).[8] In keeping with that rule, this Court has upheld conspiracy convictions as supported by sufficient evidence, even though the defendant did not participate directly in the commission of the object offense and was not charged with agreeing to do so. In *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), the Court upheld the conspiracy conviction of a drug wholesaler who supplied drugs to a physician with knowledge that the physician was distributing them unlawfully, even though the wholesaler did not personally violate the substantive law; the Court regarded it as sufficient that the wholesaler intended to further the physician's criminal objective. *Id.* at 713. In *Rabinowich*, the

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[8] That principle is related to the principle that conspirators may be punished for any reasonably foreseeable substantive offense committed by their co-conspirators in furtherance of the conspiracy's objective. *Pinkerton*, 328 U.S. at 647. The rule that conspirators are accountable for each other's acts in furtherance of the conspiracy was recognized at common law. See, *e.g.*, *Collins* v. *Commonwealth*, 3 Serg. & Rawle 220, 223, 226 (Pa. 1817); *Commonwealth* v. *Warren*, 6 Mass. 74 (1809); B.F. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 334 (1947). That principle also serves as the theoretical foundation for Federal Rule of Evidence 801(d)(2)(E), which makes the statement of one conspirator during and in furtherance of the conspiracy admissible against all his co-conspirators. See Fed. R. Evid. 801(d)(2)(E) advisory committee's note.

Court recognized that a conspiracy defendant need not have agreed to commit the object offense himself when it observed that "an averment [in the indictment] that [certain defendants] were parties to the conspiracy [was] by no means equivalent to an averment that they were to participate in the substantive offense." 238 U.S. at 87.

The same rule was recognized as firmly established in the American Law Institute's 1962 *Model Penal Code*, which stated that a person is guilty of conspiracy with another person or persons to commit a crime if he "agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime." *Model Penal Code and Commentaries*, Pt. I, § 5.03(1)(a) (1985). As the reporters of the *Model Penal Code* explained in their commentary:

> The Draft, accordingly, rests on the primordial conception of agreement as the core of the conspiracy idea. It should be emphasized, however, that so long as the purpose of the agreement is to facilitate the commission of a crime, the actor need not agree "to commit" the crime, as the statutory formulations put it. It is enough that he agree to aid in its planning or commission, thus comprehending accessorial participation if the requisite consensus is involved.

Model Penal Code, Tent. Draft No. 10, at 117 (1960); see also *Model Penal Code and Commentaries*, *supra*, at 421.

2. The RICO conspiracy provision, 18 U.S.C. 1962(d), provides that "[i]t shall be unlawful for any person to conspire to violate" the substantive RICO provisions, including Section 1962(c). Section 1962(d)

should be construed in accordance with the firmly established principles of conspiracy jurisprudence discussed above. This Court has recognized that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms that have a well-settled common law meaning. See *Molzof* v. *United States*, 502 U.S. 301, 307-308 (1992). For example, in *Shabani*, the Court relied on "the common law understanding of conspiracy," which does not contain an overt act requirement, in holding that the drug conspiracy statute, 21 U.S.C. 846, also does not contain such a requirement. See 513 U.S. at 13-14.

Nothing in the text of the RICO conspiracy provision suggests that Congress intended to depart from the long-standing doctrine that conspirators need only agree and intend that a substantive provision be violated, not that each conspirator agree to commit the violation personally. Section 1962(d) prohibits anyone from "conspir[ing] to violate" RICO. That language does not suggest, as petitioner contends, that the conspirator must agree to violate RICO himself. A similar argument was rejected in *Holte*, where the Court construed the predecessor to 18 U.S.C. 371, which punished any person or persons who conspire "to commit any offense against the United States." The Court declined to read that language to mean "an offense that all the conspirators should commit," and concluded rather that the words used "mean to adopt the common law as to conspiracy and that 'commit' means no more than bring about." *Holte*, 236 U.S. at 144. Similarly, the RICO statute's punishment of those who "conspire to violate" RICO means that those who agree that a RICO violation shall be committed violate its conspiracy provision.

Thus, a RICO conspiracy offense is established if there is an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity, which includes the agreement that the conspirators, as a group, will commit two or more racketeering acts constituting such a pattern.[9]

Petitioner's reading of Section 1962(d) to require proof of an agreement to commit personally two predicate acts of racketeering would require "a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a prescribed objective is sufficient." *United States* v. *Neapolitan*, 791 F.2d 489, 498 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986). Petitioner's argument would require this Court to conclude that Congress, in enacting Section 1962(d), had created a wholly "new form" of conspiracy at odds with traditional conspiracy doctrine. *Id.* at 497. There is no basis in the language or history of the statute to suggest that Congress had such an intention. Instead of creating a new law of conspiracy, RICO merely created a new objective for traditional

[9] There is therefore no merit to the argument of *amicus* NACDL (Br. 10-11) that a conspirator's agreement to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of RICO, means an agreement to conduct such affairs *personally*. NACDL starts from the premise that, even under the common law, "a conspiracy requires[] the individual's agreement to violate the substantive offense." Br. 10. But as we have explained, a conspiracy as traditionally understood does not require the individual's agreement to violate the offense *personally*, but rather his joining a group that collectively agrees and intends to violate the substantive offense.

conspiracy law—a violation of Section 1962(a), (b), or (c). *Ibid.*

Petitioner suggests (Pet. Br. 27-28) that Congress, in enacting RICO, intended to incorporate a rule adopted in a sentencing provision of the same omnibus anti-crime legislation, which directed enhanced sentencing for a dangerous special offender who committed a felony in furtherance of a conspiracy to engage in a pattern of criminal conduct, and who did, or agreed that he would, manage or supervise the affairs of the conspiracy. See 18 U.S.C. 3575(e)(3) (1970) (repealed). From that sentencing provision, petitioner argues that Congress, in the RICO conspiracy provision, also adopted a rule that the defendant must have intended personally to conduct the affairs of the racketeering enterprise through a pattern of racketeering activity. The former Section 3575(e)(3), however, is irrelevant to the issue before the Court in this case. The Court has in the past looked to that sentencing provision to inform RICO's definition of a "pattern" of racketeering activity, since the special-offender provision specifically defined the term "pattern" to require that criminal acts be related to one another. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985); *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-240 (1989). But see *H.J.*, 492 U.S. at 240 (noting that special-offender provision was "of no assistance" in explaining pattern element requiring *continuing* racketeering activity, because it did not address continuity). "Pattern," however, is a term without a settled common law meaning. This case concerns the meaning of "conspire," and that word had an extensive judicial gloss when Congress enacted RICO. There is no indication in the omnibus 1970 crime legislation

that Congress intended the courts to look anywhere other than well-settled principles of conspiracy law in giving meaning to that term.

3. *Amicus* NACDL argues (Br. 18-23) that a rule requiring proof of the defendant's agreement to commit the predicate acts personally is necessary to preserve requirements of the substantive RICO offense defined in Section 1962(c)—such as the requirement that the predicate acts of racketeering constitute a "pattern," the requirement that an entity identifiable as an "enterprise" be present, and the element that a defendant must "conduct or participate, directly or indirectly, in the conduct" of the enterprise. That argument is without merit. A conspiracy to violate RICO requires more than an agreement that two acts of racketeering will be committed; the conspiracy must involve an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity. See *Neapolitan*, 791 F.2d at 496 n.3. Thus, although the conspirators may not, at the time of their agreement, foresee all of the opportunities for criminal activity that will eventually cross their path, they must anticipate that the criminal association will "function as a continuing unit," thus constituting an enterprise (see *United States* v. *Turkette*, 452 U.S. 576, 583 (1981)), that the criminal acts will be related, thus constituting a pattern (see *H.J.*, 492 U.S. at 239), and that at least one among them will manage or operate the enterprise (see *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1993)). Those elements of the unlawful agreement eliminate any danger that a RICO

conspiracy defendant will be convicted merely on the basis of "guilt by association" (see NACDL Br. 22).[10]

A personal-commission rule would, in fact, undermine the goals of conspiracy law generally and the RICO statute in particular. First, traditional principles of conspiracy law permit authorities to intervene when the criminal agreement is formed, even when "the object dimension * * * [is still] of indeterminate scope." See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 919, 930 (1959). Assume, for example, that a group of people agree to set up an arson-for-hire ring to take advantage of future criminal opportunities, but that they are discovered before any definitive plans to carry out acts of arson materialize. Or assume that a group of corrupt probate judges, court clerks, and estate lawyers agree to use in the future the judges' power to appoint personal representatives in return for kickbacks and bribes, but that the conspirators are discovered early, before any opportunities to engage in their corruption arise, and that not every member of the conspiracy is in a position either to give or to receive bribes. In both cases, the confederates have conspired among themselves to conduct the affairs of an enterprise through a pattern of racketeering activity, even if

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[10] It is therefore irrelevant to this case that petitioner was acquitted on one of the two predicate acts of racketeering with which he was charged, and was therefore acquitted on the substantive count of racketeering. J.A. 143. Because the jury necessarily found that petitioner agreed to the conduct of the affairs of the overall enterprise, the Hidalgo County Sheriff's Office, through a pattern of bribes, he was properly convicted of conspiracy, even though he was found to have *personally* committed only one act of racketeering, bribery involving the acceptance of two Rado watches from Beltran. See J.A. 57.

they have not assigned definite roles in the enterprise to every member of the conspiracy, and even if some roles do not necessarily involve the personal commission of racketeering acts. Each case, like that of "'Murder Incorporated[,]' would be a group contemplating the commission of other than a definite number of crimes" (*ibid.*) and would be punishable as a conspiracy.

Often, the government will not know which member or members of a RICO conspiracy intends actually to commit the object offense until the offense has been committed; indeed, the conspirators themselves might not decide until long after their initial agreement how precisely they will go about achieving their criminal goal. Requiring the government to show not merely that the defendant entered into an agreement having a criminal object, but also that he personally agreed to commit the object offense, would in many cases defeat a principal purpose of the conspiracy concept (both in RICO and elsewhere)—to enable the government to intervene before the illegal acts intended by a criminal collaboration actually occur. See *United States* v. *Feola*, 420 U.S. 671, 694 (1975); *Rabinowich*, 238 U.S. at 88; *Developments in the Law—Criminal Conspiracy*, *supra*, 72 Harv. L. Rev. at 924 ("When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage. In this situation the reasons for which the law is reluctant to intervene are considerably weaker."); *Model Penal Code and Commentaries*, *supra*, at 388 (conspiracy law properly permits "preventive intervention by the agencies of law enforcement").

Second, adherence to traditional conspiracy doctrine furthers Congress's major purpose in enacting

RICO, the eradication of organized crime. *H.J.*, 492 U.S. at 245. A requirement that each member of a RICO conspiracy agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from coverage those organized crime figures shrewd enough to insulate themselves from the criminal acts committed by their underlings. As two scholars in the field of organized crime have observed:

> The reason why most of the top leaders [of the Cosa Nostra] are able to live and flourish without going to jail is because they are carefully insulated from contact with crime. That is, insulated from those criminals who get their hands dirty. Many of the criminal brass could take, and pass, a lie detector test during which they could deny having touched or seen a deck of heroin, been in a bookie joint, or [having] known any loansharks, extortionists or murderers in years.

R. Salerno & J. Tompkins, *The Crime Federation: Cosa Nostra and Allied Operations in Organized Crime* 156 (1969) (*quoted in* J. Minnis, Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 Tul. L. Rev. 1399, 1412 n.80 (1988)); see also Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, *Organized Crime and Illicit Traffic in Narcotics*, S. Rep. No. 72, 89th Cong., 1st Sess. 2 (1965) (convicting crime chieftains is "usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the

utmost care to insulate himself from any apparent physical connection with the crime").[11]

Congress reinforced the sweep of the RICO statute by expressly directing that "[t]he provisions of this Title [Title IX of the Organized Crime Control Act of 1970] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (18 U.S.C. 1961 note). In light of the statute's purpose to eradicate organized crime, Congress's "self-consciously expansive language and overall approach," *Sedima*, 473 U.S. at 498, and the congressional directive to construe the statute liberally, there is no basis for narrowing Section 1962(d) by imposing a personal-commission requirement that is foreign to traditional conspiracy law. RICO's liberal-construction clause "seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute." *Reves*, 507 U.S. at 183. Petitioner's construction, by insulating some of

[11] Two pre-RICO cases—*People* v. *Luciano*, 14 N.E.2d 433 (N.Y. 1938), and *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), cert. denied, 362 U.S. 974, 982 (1960)—illustrate the operating style of many organized-crime chieftains. In describing a large-scale prostitution ring run by Charles "Lucky" Luciano, the head of the New York syndicate in the late 1930s, the *Luciano* opinion noted that Luciano himself "did not take an active part in the daily operations of the business." 14 N.E.2d at 434. In *Aviles*, the court of appeals affirmed the narcotics conspiracy conviction of Luciano's successor, Vito Genovese, explaining: "Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy." 274 F.2d at 188.

those who occupy the highest rungs of organized crime, would have that unjustified effect.

4. Petitioner and *amicus* NACDL make a number of additional arguments in favor of reversal here, all of which are without merit. First, petitioner argues that the government conceded in the district court that he could be convicted only if he were shown to have agreed personally to commit two acts of racketeering, and that this case was tried against him under that theory. Pet. Br. 28-29. The prosecutor explained to the district court, however, that, "[i]f he [petitioner] generally knows what's going on, he knows that these [racketeering acts] are happening, then he would be liable." Tr. 1290-1291. The prosecutor also agreed with the court's statement that "[the defendant] doesn't necessarily have to know about every particular act as long he's in the relationship," by responding, "Yes, sir. That he has knowledge that it's going on. * * * A pattern that's occurring and that he's willing and able to participate. He assists by being available." Tr. 1291. The district court clearly ruled that the government did not have to prove that petitioner agreed to commit two acts of racketeering personally and instructed the jury on that basis in accordance with that ruling, see J.A. 154-155, and the government defended that ruling and instruction in the court of appeals, see Gov't C.A. Br. 43-47.[12]

[12] Petitioner also argues (Pet. Br. 31-32) that the RICO instructions given here would not have been valid in the Eleventh Circuit, which arguably requires, in a "single objective" RICO case, that the defendant have agreed to commit two racketeering acts personally. Whether or not petitioner might have prevailed on appeal had his case been brought in the Eleventh Circuit, the correct rule, in our view, is that, in every RICO conspiracy case, the defendant need only have

Second, petitioner suggests (Pet. Br. 36) that application of the RICO statute to state and local government officials is contrary to *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *McNally* v. *United States*, 483 U.S. 350 (1987), which he reads as requiring a clear statement of congressional purpose to subject state governmental entities to federal law. That claim was not presented in the petition for a writ of certiorari and is not "fairly included" within the RICO question on which review was granted, which is limited to the personal-commission issue. Accordingly, the Court should not reach the issue. See *Yee* v. *City of Escondido*, 503 U.S. at 533. In any event, this case is unlike *Gregory* or *McNally*, for this case involves a federal prosecution of a conspiracy to commit predicate acts that are felonies, not federal preemption of state policymaking authority in matters such as "disclosure and good government for local and state officials" (*McNally*, 483 U.S. at 360). Furthermore, it is well settled that a state governmental entity may be an "enterprise" within the meaning of RICO. See *United States* v. *Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 910, 945 (1982); *United States* v. *Thompson*, 685 F.2d 993 (6th Cir.) (en banc), cert. denied, 459 U.S. 1072 (1982). An enterprise

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agreed to the commission of racketeering acts by members of the conspiracy, not necessarily himself. The Eleventh Circuit's distinction of single-objective and multiple-objective RICO cases in *United States* v. *Carter*, 721 F.2d 1514 (11th Cir.), cert. denied, 469 U.S. 819 (1984), appears to have been based on an effort to reconcile its own RICO conspiracy precedents, a task that this Court need not undertake. The Eleventh Circuit's treatment of that point in *Carter* was thoroughly and convincingly criticized by the Seventh Circuit in *Neapolitan*, 791 F.2d at 499 n.5.

under RICO may be "any entity"—in other words, "anything that exists," including a state agency. *Angelilli*, 660 F.2d at 31.

Finally, petitioner argues that the racketeering acts charged in the RICO conspiracy count—state bribery offenses—are not predicate offenses because they are not punishable by more than one year's imprisonment under Texas law. Pet. Br. 37-40. That argument, too, was not presented in the certiorari petition and is not properly before the Court. In any event, the court of appeals properly rejected the contention. Pet. App. 19-20. The predicate state-law offense of bribery, Tex. Penal Code Ann. § 36.02(a) (West 1994), is not superseded by the misdemeanor gratuity offense, *id.* § 36.08(b), in cases like this one, involving a bribe given as a *quid pro quo* for a benefit, since the misdemeanor offense does not contain the element of *quid pro quo*. Pet. App. 20; *Cerda* v. *State*, 750 S.W.2d 925, 927 (Tex. Ct. App. 1988). Section 36.02(a) does not contain any element that the person offering a bribe must be in custody, and petitioner was a "public servant" covered by the plain language of the prohibitions of Section 36.02(a), since he was "selected" or "appointed" as an "agent of government." Accordingly, petitioner was properly convicted of RICO conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 666 of Title 18, United States Code, provides:

Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to

influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or govern-

ments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

2. Section 1961 of Title 18, United States Code, provides:

Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from

interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles

or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (ex-

cluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in viclation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the

Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

3. Section 1962 of Title 18, United States Code, provides:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either

in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

4. Section 4002 of Title 18, United States Code, provides:

Federal prisoners in State institutions; employment

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and

the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.